Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

(2)

No. 91-1337

In the Supreme Court of the United States

OCTOBER TERM, 1991

JAMES L. McCOY, ADMINISTRATOR OF THE ELECTRICAL WORKERS TRUST FUNDS, LOCAL 103 I.B.E.W.,
PETITIONER,

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY SWOPE
Counsel of Record
BRUCE D. BERNS
PALMER & DODGE
One Beacon Street
Boston, MA 02108
(617) 573-0100

April 15, 1992

COUNTERSTATEMENT
OF QUESTIONS PRESENTED

The decision of the First Circuit Court of Appeals that the Employee Retirement Income Security Act ("ERISA") pre-empts a Massachusetts statute that expressly authorizes ERISA plans to establish mechanics' liens presents the following questions:

1. Did the First Circuit correctly find all of the funds administered by the petitioner to be ERISA funds, when the petitioner's complaint alleged that they were, and he failed in the District Court adequately to argue that one was not?

2. Did the First Circuit correctly decide that ERISA pre-empts a claim under the Massachusetts mechanics' lien statute by ERISA funds?

3. Did the First Circuit correctly reject the argument that the Massachusetts mechanics' lien statute was saved from pre-emption by virtue of being incorporated into Fed. R. Civ. P. 64 or other provisions of federal law?

RULE 29.1 LISTING

Respondent Massachusetts Institute of Technology states that it is a nonprofit entity chartered under the laws of the Commonwealth of Massachusetts, and has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

PAGE

Counterstatement of Questions Presented i

Rule 29.1 Listing ii

Table of Authorities v

Introduction 1

Statement of the Case 2

Reasons for Denying the Writ 2

I. MCCOY'S CONTENTION THAT ONE OF HIS FUNDS IS NOT SUBJECT TO ERISA WAS CORRECTLY REJECTED BY THE FIRST CIRCUIT BECAUSE MCCOY FAILED TO RAISE IT ADEQUATELY IN THE DISTRICT COURT; THE CONTENTION IS ERRONEOUS, TO BOOT 3

II. MCCOY'S ARGUMENTS AGAINST ERISA PRE-EMPTION AMOUNT TO A REQUEST THAT THIS COURT REVERSE ITS SETTLED PRECEDENTS, DESPITE THE FACT THAT THIS COURT HAS CONSISTENTLY ADHERED TO THOSE PRECEDENTS . . . 7

A. This Court Has Consistently Held That ERISA's Broad Pre-emption Provision Supersedes All State Laws Relating Directly Or Indirectly To Employee Benefit Plans 8

B. The First Circuit Correctly Applied This Court's Precedents When It Held That The Massachusetts Mechanics' Lien Statute Is Pre-empted By ERISA 10

C. The Court Has Recently Denied Certiorari In Three Cases That Reached The Same Conclusion As That Reached By The First Circuit In This Case. 12

D. There Is No Significant Conflict Among Courts Of Appeals Or The State Courts Regarding The Scope Of ERISA's Pre-emption In Such Cases 13

III. MCCOY'S ATTEMPT TO RESCUE THE MASSACHUSETTS MECHANICS' LIEN STATUTE FROM PRE-EMPTION BY REFERENCE TO FEDERAL RULE OF CIVIL PROCEDURE 64 AND OTHER PROVISIONS OF FEDERAL LAW IS FUTILE 16

Conclusion 20

TABLE OF AUTHORITIES

CASES

Adickes v. *S.H. Kress & Co.*,
398 U.S. 144 (1970) 19

Bricklayers and Allied Craftsmen International Union Local 33 Benefit Funds v. *America's Marble Source, Inc.*,
950 F. 2d 114 (CA3 1991) . . . . . 2 n. 5, 8 n. 9, 14 n. 11

Bricklayers Fringe Benefit Funds v. *North Perry Baptist Church of Pontiac*,
590 F.2d 207 (CA6), *cert. denied*,
444 U.S. 834 (1979) 18

Carpenters Southern California Administrative Corp. v. *El Capitan Development Co.*,
53 Cal. 3d 1041, 282 Cal. Rptr. 277,
811 P.2d 296, *cert. denied*,
112 S. Ct. 430 (1991) . . . . . 2-3 n. 6, 13

Franchise Tax Board of California v. *Construction Laborers Vacation Trust for Southern California*,
463 U.S. 1 (1983) 8

Idaho Plumbers and Pipefitters Health and Welfare Fund v. *United Mechanical Contractors, Inc.*, 875 F. 2d 212 (CA9 1989) . . . . . 15 n. 12

Iron Workers Mid-South Pension Fund v. *Terotechnology Corp.*, 891 F.2d 548 (CA5), *cert. denied*, 110 S. Ct. 3272 (1990) . . . . . 2-3 n. 6, 12, 14, 18

Mackey v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1987) 9, 10, 11, 12

McMahon v. *McDowell*, 794 F. 2d 100 (CA3), *cert. denied*, 479 U.S. 971 (1986) . . . . . 2-3 n. 6, 12

Metropolitan Life Insurance Co. v. *Massachusetts*, 471 U.S. 724 (1985) 9

Pilot Life Insurance Co. v. *Dedeaux*, 481 U.S. 41 (1987) 8, 9, 10, 11

Plumber's Local 458 Holiday Vacation Fund v. *Howard Immel, Inc.*, 151 Wis. 2d 233, 445 N.W. 2d 43 (1989) 15

Prestridge v. *Shinault*, 552 So. 2d 643 (La. Ct. App. 1989), *writ denied*, 559 So. 2d 131 (La. 1990) 14

Retirement Fund of the Fur Manufacturing Industry v. *Getto & Getto, Inc.*, 714 F. Supp. 651 (SD NY 1989) . . . . . 15 n. 12

Sasso v. *Vachris*, 66 N.Y.2d 28, 484 N.E. 2d 1359, 494 N.Y.S. 2d 856 (1985) . . . 15 n. 12

Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 8, 9, 11

Sturgis v. *Herman Miller, Inc.*, 943 F. 2d 1127 (CA9 1991) . . . . . 2 n. 5, 14

STATUTES

Federal

28 U.S.C. § 2072 (Rules Enabling Act) (1988 ed.) 17

29 U.S.C. § 185(a) (Section 301(a) of the Labor Management Relations (Taft-Hartley) Act) (1988 ed.) 19

29 U.S.C. § 186 (Section 302 of the Labor Management Relations (Taft-Hartley) Act) (1988 ed.) . . . . . 5 & n. 8, 6

29 U.S.C. § 186(c) (Section 302(c) of the Labor Management Relations (Taft-Hartley) Act) (1988 ed.) 5

29 U.S.C. § 1002(1) (Section 3(1) of the Employee Retirement Income Security Act (ERISA)) (1988 ed.) 5

29 U.S.C. § 1144(a) (Section 514(a) of ERISA) (1988 ed.) . . . . . 1 & n. 2, 8

29 U.S.C. § 1144(d) (Section 514(d) of ERISA) (1988 ed.) . . . . . 3 & n. 7, 16 & n. 13

29 U.S.C. § 1145 (Section 515 of ERISA) (1988 ed.) 19

Massachusetts

Mass. G.L. c. 254 (1990 ed.) (the Massachusetts mechanics' lien law) . . . . . *passim*

Mass. G. L. c. 254, § 1 (1990 ed.) 5

RULES

Fed. R. Civ. P. 64 . . . . . 3, 16, 17 & n. 14, 18 n. 15

Sup. Ct. R. 10.1 . . . . . 4, 7, 16

MISCELLANEOUS

ERISA Procedure 76-1, § 10,
41 Fed. Reg. 36,281 (Aug. 27, 1976) 7

United States Department of Labor,
ERISA Advisory Opinions 6, 7

Respondent Massachusetts Institute of Technology ("MIT") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the First Circuit Court of Appeals in this case. That decision[1] concerns the provision in the Employee Retirement Income Security Act (ERISA) that ERISA supersedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.[2]

Based upon that provision, the First Circuit held that ERISA pre-empts this action brought against MIT by James L. McCoy, Administrator of several employee benefit plans ("McCoy"), pursuant to the Massachusetts mechanics' lien statute.[3] The First Circuit reached that conclusion on the ground that the Massachusetts lien statute "relate[s] to" ERISA plans because the lien statute expressly authorizes such plans to enforce liens against property owners in order to recover delinquent ERISA employer contributions owed by other parties (Pet. A8-A13; 950 F. 2d at 18-20). The First Circuit therefore affirmed

---

[1] 950 F. 2d 13 (CA1 1991), reproduced at pages A1-A20 of Appendix A to the Petition for Writ of Certiorari (references to that petition will hereinafter be cited as "Pet.," followed by the applicable page number, which in the case of the appendices to the petition is preceded by the letter "A").

[2] Section 514(a) of ERISA, 29 U.S.C. § 1144(a) (1988 ed.).

[3] Mass. G.L. c. 254 (1990 ed.).

the District Court's decision[4] dismissing McCoy's action as pre-empted by ERISA.

STATEMENT OF THE CASE

For the purposes of the Court's review of this petition for writ of certiorari, MIT is not dissatisfied with McCoy's Statement of the Case.

REASONS FOR DENYING THE WRIT

The Supreme Court should deny certiorari because the First Circuit correctly held that ERISA pre-empts the Massachusetts mechanics' lien law for ERISA plans. That decision was required under established precedents of this Court, and is consistent with the decisions of every federal appeals court that has considered the matter, including cases decided in the Third and Ninth Circuits within months of the First Circuit's decision in this case.[5] The soundness of the First Circuit's holding is further shown by the fact that this Court has in the past six years denied certiorari review of three cases that reached the same conclusion as that reached by the First Circuit in this case.[6]

---

[4] 760 F. Supp. 12 (D. Mass. 1991), Pet. A22-A29.

[5] *Bricklayers and Allied Craftsmen International Union Local 33 Benefit Funds* v. *America's Marble Source, Inc.*, 950 F. 2d 114 (CA3 1991); *Sturgis* v. *Herman Miller, Inc.*, 943 F. 2d 1127 (CA9 1991).

[6] *Carpenters Southern California Administrative Corp.* v. *El Capitan Development Co.*, 53 Cal. 3d 1041, 282 Cal. Rptr. 277, 811 P. 2d 296, *cert. denied*, 112 S.Ct. 430 (1991); *Iron Workers Mid-South Pen-*

The Court should also deny certiorari on McCoy's alternative grounds. The First Circuit did not err in rejecting McCoy's claim that one of the funds he administers is not an employee benefit plan under ERISA. Nor does the provision of ERISA that saves federal laws, rules, and regulations from ERISA pre-emption[7] resuscitate the Massachusetts mechanics' lien law through the lien law's alleged incorporation into Rule 64 of the Federal Rules of Civil Procedure or other provisions of federal law.

The remainder of MIT's opposition addresses each of these points, in the order that they are set out in McCoy's petition.

I. MCCOY'S CONTENTION THAT ONE OF HIS FUNDS IS NOT SUBJECT TO ERISA WAS CORRECTLY REJECTED BY THE FIRST CIRCUIT BECAUSE MCCOY FAILED TO RAISE IT ADEQUATELY IN THE DISTRICT COURT; THE CONTENTION IS ERRONEOUS, TO BOOT.

McCoy launches his petition for certiorari (Sections I and II, Pet. 5-9) with arguments that the First Circuit rejected as "procedurally defaulted" (Pet. A16-A17; 950 F. 2d at 22) due to McCoy's failure to raise them adequately before the District Court. McCoy's contention that

---

sion Fund v. *Terotechnology Corp.*, 891 F. 2d 548 (CA5), *cert. denied*, 110 S.Ct. 3272 (1990); *McMahon* v. *McDowell*, 794 F. 2d 100 (CA3), *cert. denied*, 479 U.S. 971 (1986).

[7] Section 514(d) of ERISA, 29 U.S.C. § 1144(d) (1988 ed.).

the First Circuit erred in this aspect of its decision therefore cannot be said to state "an important question of federal law." Sup. Ct. R. 10.1(c).

McCoy claims that one of the funds on behalf of which he brought this action, the Electrical Workers Educational and Cultural Fund, Local 103, I.B.E.W. ("E&C Fund"), is not a fund covered by ERISA, and therefore is not subject to the ERISA provision that the First Circuit held pre-empts the Massachusetts mechanics' lien law. McCoy erroneously asserts that the First Circuit concluded "[a]s [a] [m]atter [o]f [l]aw" (Pet. 5) that the E&C Fund was an ERISA fund. What the First Circuit in fact ruled (Pet. A16-A18; 950 F. 2d at 22-23) was that McCoy had failed to preserve the question for appellate review, because in the District Court he only

> made passing mention of the general point — a mention which, in its entirety, comprised two sentences and one citation (to a tangentially relevant case) [footnote omitted].

(Pet. A16; 950 F. 2d at 22.)

Given the off-handed manner in which McCoy initially treated this point, it is startling that he now represents to this Court that the issue is an "important question of federal law [that] warrants this Court's review" (Pet. 6). In order to justify asking for this Court's attention to a question, a petitioner should at least be able to show that he developed it fully when it first arose. McCoy cannot do so in this case.

To the extent that the First Circuit did address the merits of McCoy's claim regarding the status of the E&C Fund, it made no ruling "as a matter of law," but simply noted (Pet. A18; 950 F. 2d at 23) that McCoy himself had alleged that the E&C Fund was the type of fund to which the Massachusetts mechanics' lien law and ERISA applied.

Both statutes cite the same provision in the Labor Management Relations (Taft-Hartley) Act to define the funds to which they refer. The Massachusetts mechanics' lien statute, Mass. G.L. c. 254, § 1 (1990 ed.), provides that the persons authorized to utilize the mechanics' lien law include

> the trustee or trustees of any fund or funds, established pursuant to section 302 of the Taft Hartley Law (29 USC 186)[8] . . . .

ERISA provides that it governs employee benefit plans established or maintained for the purposes of providing participants or their beneficiaries, *inter alia*, "any benefit described in section 186(c)" of Title 29 of the United States Code. 29 U.S.C. § 1002(1) (1988 ed.).

---

[8] As the First Circuit noted, § 302 of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 186, is not a provision "pursuant to" which a fund can be established (Pet. A12 n. 2; 950 F. 2d at 19 n. 2). It is instead a statute that regulates financial transactions between employers and unions, in the course of which certain employee benefits are described. It is these benefits that the Massachusetts mechanics' lien law and ERISA incorporate by reference.

In the second paragraph of his complaint, McCoy alleged that all of the funds he administered, including the E&C Fund, were "established pursuant to the requirements of 29 U.S.C. § 186" (Pet. A32), the same section referred to by the Massachusetts mechanics' lien law and by ERISA. Therefore the First Circuit's conclusion that the E&C Fund is both an ERISA fund and a fund specifically identified in the Massachusetts mechanics' lien law simply follows from the facts pleaded by McCoy in his complaint.

McCoy's argument to this Court amounts to the contention that the First Circuit should have rejected the allegations in McCoy's own complaint about the nature of the E&C Fund, and instead should have accepted the contradictory allegations McCoy tried to assert on appeal. That argument also fails to present any substantial federal question that would warrant this Court granting a petition for writ of certiorari.

McCoy's suggestion that the First Circuit's treatment of the E&C Fund as an ERISA fund contradicts interpretations by the United States Department of Labor in two advisory opinions, set out in full text in Appendices F and G to McCoy's petition (Pet. A42-A51), is wrong. In fact, those opinions reach their conclusions only after examination of the particular activities of the two plans for which those opinions were sought. McCoy provided no description of the E&C Fund in his complaint that would have permitted a comparison of the activities of that Fund with the activities of the funds addressed in the two advisory opinions.

In any event, such advisory opinions are so fact-specific that the Department of Labor's published procedures expressly provide that "[o]nly the parties described in the request for opinion may rely on the opinion . . ." (ERISA Procedure 76-1, § 10, 41 Fed. Reg. 36,281, 36,283 (Aug. 27, 1976)). McCoy's attempt to capture the Court's interest with a supposed conflict between the First Circuit's decision and settled Department of Labor interpretations must therefore fail.

II. MCCOY'S ARGUMENTS AGAINST ERISA PRE-EMPTION AMOUNT TO A REQUEST THAT THIS COURT REVERSE ITS SETTLED PRECEDENTS, DESPITE THE FACT THAT THIS COURT HAS CONSISTENTLY ADHERED TO THOSE PRECEDENTS.

The principal thrust of McCoy's argument in favor of certiorari (Sections III and IV, Pet. 9-17) is that the First Circuit incorrectly decided that the Massachusetts mechanics' lien statute is pre-empted by ERISA. That contention ignores this Court's settled rulings regarding the scope of ERISA pre-emption in such cases, rulings that have been uniformly applied by all of the federal Courts of Appeals that have considered such issues. McCoy's arguments in this branch of his petition therefore fail to present "an important question of federal law" that this Court has not yet decided, and fail to show that the First Circuit's decision conflicts with applicable decisions of this Court or other Courts of Appeals. Sup. Ct. R. 10.1(b) and (c).

A. *This Court Has Consistently Held That ERISA's Broad Pre-emption Provision Supersedes All State Laws Relating Directly Or Indirectly To Employee Benefit Plans.*

ERISA expressly provides that its terms "shall supersede *any and all* State laws insofar as they may now or hereafter *relate to* any employee benefit plan . . . ." Section 514(a) of ERISA, 29 U.S.C. § 1144(a) (1988 ed.) (italics added). This Court has found the pre-emption provision of ERISA to be "deliberately expansive" and designed to reserve to federal authority the sole power to regulate the field of employee benefit plans. *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 45-46 (1987). See also *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983) (legislative history "indicate[s] that the section's pre-emptive scope was as broad as its language [citations omitted]").[9] Indeed, this Court has characterized the pre-emption provision of ERISA as "virtually unique." *Franchise Tax Board of California* v. *Construction*

---

[9] McCoy's contention (Pet. 10-13) that the legislative history of ERISA demonstrates an intention to preserve collection remedies like the Massachusetts mechanics' lien law ignores the Court's holding in *Shaw*. Moreover, the legislative history McCoy cites is not about Congress's consideration of the ERISA pre-emption provision itself, which was enacted in 1974, but instead about Congress's consideration of amendments to add new remedies six years later (Pet. 10). The Third Circuit recently found such later history not helpful in determining the scope of the ERISA pre-emption provision. See *Bricklayers and Allied Craftsmen International Union Local 33 Benefit Funds* v. *America's Marble Source, Inc.*, 950 F. 2d 114, 120-21 (CA3 1991).

Laborers Vacation Trust for Southern California, 463 U.S. 1, 24 n. 26 (1983).

As corollaries to these sweeping pronouncements, the Court has liberally defined the extent to which a state law can "relate to" an employee benefit plan in order to fall within ERISA's pre-emption, and has rejected arguments that state laws should not be pre-empted if they serve to assist, rather than thwart, the goals of ERISA.

On the first corollary point, the Court has held that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (footnote omitted) (1983). Thus the pre-emption provision applies not only to state laws that directly regulate employee benefit plans (see *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 829 (1988) ("we have virtually taken it for granted that state laws which are 'specifically designed to affect employee benefit plans' are pre-empted under § 514(a)")), but also to state laws that indirectly affect such plans (see *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 47-48 (1987) (ERISA "pre-emption clause is not limited to 'state laws specifically designed to affect employee benefit plans'"), quoting *Shaw*, 463 U.S. at 98).

On the second corollary point, the Court has held that the reach of ERISA's pre-emption provision extends not just to state laws that conflict with the federal regulatory scheme, but even to those that are consistent with and supportive of ERISA's purposes. See, *e.g.*, *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 739

(1985) ("The pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements [citation omitted]."); *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 830 (1987) ("Legislative 'good intentions' do not save a state law within the broad pre-emptive scope of § 514(a).").

The reason that § 514(a) pre-empts all state laws that relate to employee benefit plans, whether or not they conflict with ERISA's remedial objectives, is that ERISA establishes a uniform federal system for dealing with employee benefit plans. Even in those situations where state statutes arguably further ERISA remedies rather than conflict with them, differing state remedies would destroy the uniformity of that system. See *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987) (Congress's expectation of commonality under ERISA "would make little sense if the remedies available . . . could be supplemented or supplanted by varying state laws"). ERISA pre-empts state remedies in order to avoid this risk of inconsistency.

B. *The First Circuit Correctly Applied This Court's Precedents When It Held That The Massachusetts Mechanics' Lien Statute Is Pre-empted By ERISA.*

Because the Massachusetts mechanics' lien statute expressly authorizes the trustee of an employee benefit plan governed by ERISA to establish and enforce a lien against real property owned by an unrelated party in order to recover an employer's delinquent ERISA contributions, the First Circuit concluded that the Massachusetts statute pro-

vides a mechanism to fund employee benefit plans that was not included by Congress when it designed the ERISA provisions for enforcing employers' obligations to make employee benefit plan contributions (Pet. A11-A12; 950 F. 2d at 19-20). The First Circuit therefore held that the Massachusetts statute falls squarely within ERISA's pre-emption provision, as construed and applied by this Court.

McCoy contends that the First Circuit's decision conflicts with this Court's holding in *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1987). That contention is simply wrong, because this Court in *Mackey* used language that requires the result reached by the First Circuit. First, this Court said in *Mackey*:

> we have *virtually taken it for granted* that state laws which are 'specifically designed to affect employee benefit plans' are pre-empted under § 514(a).

486 U.S. at 829 (italics added), quoting *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 47-48 (1987), and *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983). The Court therefore concluded that

> [t]he state statute's express reference to ERISA plans suffices to bring it within the federal law's pre-emptive reach.

486 U.S. at 830. Finally, to demonstrate even more emphatically that it meant what it said, the Court provided the following unequivocal principle:

> *any* state law which singles out ERISA plans, by express reference, for special treatment is pre-empted.

Id., at 838 n. 12 (italics in the original).

Given this clear language, and the fact that the Massachusetts mechanics' lien law specifically "singles out" ERISA plans, the First Circuit was completely faithful to the directives of this Court in *Mackey* when it held that the Massachusetts law was pre-empted. It is nonsensical for McCoy to contend that the First Circuit misapplied *Mackey*, when *Mackey* itself says that this Court "virtually take[s] it for granted" that state laws designed to affect ERISA plans are pre-empted.

C. *The Court Has Recently Denied Certiorari In Three Cases That Reached The Same Conclusion As That Reached By The First Circuit In This Case.*

McCoy's request that the Court grant certiorari in this case ignores the significance of the fact that the Court has recently denied petitions for certiorari in three cases that, like the First Circuit's decision in this case, found ERISA pre-emption of state collection statutes that specifically applied to ERISA plans.

In *Iron Workers Mid-South Pension Fund* v. *Terotechnology Corp.*, 891 F. 2d 548 (CA5), *cert. denied*, 110 S. Ct. 3272 (1990), the Fifth Circuit had held that ERISA pre-empted the Louisiana mechanics' lien statute. In *McMahon* v. *McDowell*, 794 F. 2d 100 (CA3), *cert.*

denied, 479 U.S. 971 (1986), the Third Circuit had held that ERISA pre-empted Pennsylvania's Wage Payment and Collection Law to the extent that it gave employee benefit plans the right to collect against the officers and directors of employer companies. Finally, only a few months ago the Court denied a petition for writ of certiorari to review a decision of the Supreme Court of California that had held a state law similar to the Massachusetts mechanics' lien statute pre-empted by ERISA. *Carpenters Southern California Administrative Corp.* v. *El Capitan Development Co.*, 53 Cal. 3d 1041, 282 Cal. Rptr. 277, 811 P. 2d 296, *cert. denied*, 112 S. Ct. 430 (1991).

These denials of certiorari give no indication that this Court is in any way dissatisfied with the reading lower courts are giving this Court's precedents regarding ERISA pre-emption of such state statutes. There is therefore no basis on which McCoy can claim that the First Circuit's decision in his case warrants review because it conflicts with applicable decisions of this Court.

D. *There Is No Significant Conflict Among Courts Of Appeals Or The State Courts Regarding The Scope Of ERISA's Pre-emption In Such Cases.*

McCoy asserts the need for this Court "[t]o [r]esolve [t]he [c]onflict [a]mong [c]ourts" over the application of ERISA pre-emption to state laws like the Massachusetts mechanics' lien statute (Pet. 14). In truth, there is no real conflict. The First Circuit's decision is in accord with the decisions of every other federal Court of

Appeals that has considered the same issue.[10] In addition to the cases in the Third[11] and Fifth Circuits cited in the previous section, for which the Court denied petitions for certiorari, the Ninth Circuit has reached the same conclusion. *Sturgis* v. *Herman Miller, Inc.*, 943 F. 2d 1127 (CA9 1991).

Two state courts have also followed this Court's precedents. In addition to the California decision cited in the previous section, for which the Court denied a petition for certiorari late last year, the Court of Appeals in Louisiana reached the same conclusion. *Prestridge* v. *Shinault*, 552 So. 2d 643 (La. Ct. App. 1989) (finding pre-emption of the same Louisiana mechanics' lien statute that was subsequently found pre-empted in *Iron Workers Mid-South Pension Fund* v. *Terotechnology Corp.*, 891 F. 2d 548 (CA5), *cert. denied*, 110 S. Ct. 3272 (1990)), *writ denied*, 559 So. 2d 131 (La. 1990).

---

[10] McCoy implicitly acknowledges this unanimity at the federal level, when he includes in the caption of his argument concerning congressional intent an assertion that the Courts of Appeals have "[c]ontinued [d]isregard" for that intent (Pet. 9; see also Pet. 10). The flaws in McCoy's reliance on legislative history are explained above (p. 8 n. 9).

[11] The Third Circuit recently addressed these issues a second time, when it held that the New Jersey mechanics' lien statute was pre-empted by ERISA, following the same reasoning as in that court's earlier decision in *McMahon*, as well as the consensus reasoning of all of the other Courts of Appeals that have considered these issues. *Bricklayers and Allied Craftsmen International Union Local 33 Benefit Funds* v. *America's Marble Source, Inc.*, 950 F. 2d 114 (CA3 1991).

The only[12] court that has declined to find pre-emption of a state law like the Massachusetts mechanics' lien statute is the Wisconsin Supreme Court, in its decision in *Plumber's Local 458 Holiday Vacation Fund* v. *Howard Immel, Inc.*, 151 Wis. 2d 233, 445 N.W. 2d 43 (1989). But even that ruling is distinguishable, because it involved a statutory lien remedy to collect contributions owed by an employer from a property owner that had agreed by contract to assume the employer's ERISA obligations. The existence of a single, only possibly inconsistent state court ruling is no justification for this Court's granting certiorari to review the First Circuit's decision, which reaches conclusions completely consistent those in the many other federal and state decisions that have considered these issues.

---

[12] McCoy also cites (Pet. 12) *Idaho Plumbers and Pipefitters Health and Welfare Fund* v. *United Mechanical Contractors, Inc.*, 875 F. 2d 212 (CA9 1989), *Sasso* v. *Vachris*, 66 N.Y.2d 28, 484 N.E. 2d 1359, 494 N.Y.S. 2d 856 (1985), and *Retirement Fund of the Fur Manufacturing Industry* v. *Getto & Getto, Inc.*, 714 F. Supp. 651 (SD NY 1989). The First Circuit's decision explains why *Sasso* is inapposite (Pet. A13 n. 3; 950 F. 2d at 20 n. 3). *Getto* relied principally on *Sasso*. *United Mechanical* does not involve state law at all, but instead the pre-emption of alternative contractual provisions under federal common law. 875 F. 2d at 216-17.

III. MCCOY'S ATTEMPT TO RESCUE THE MASSACHUSETTS MECHANICS' LIEN STATUTE FROM PRE-EMPTION BY REFERENCE TO FEDERAL RULE OF CIVIL PROCEDURE 64 AND OTHER PROVISIONS OF FEDERAL LAW IS FUTILE.

The final contention McCoy offers in support of his petition (Sections V and VI, Pet. 17-25) is a tortured argument that the Massachusetts mechanics' lien statute is saved from ERISA pre-emption by a provision of ERISA that states that ERISA shall not be construed to supersede any federal law, rule, or regulation.[13] That argument is supported by no authority of this Court or of any federal or state court, and so fails to present "an important question of federal law" or to demonstrate any conflict with applicable decisions of this Court or other Courts of Appeals. Sup. Ct. R. 10.1(b) and (c).

Because the ERISA savings provision applies only to federal law, and because the Massachusetts mechanics' lien law is obviously not a provision of federal law, McCoy offers the novel suggestion that Rule 64 of the Federal Rule

---

[13] Section 514(d) of ERISA provides that:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law.

29 U.S.C. § 1144(d) (1988 ed.).

of Civil Procedure[14] regarding pre-judgment remedies provides the necessary nexus between the state lien law and federal law.

The First Circuit rejected this contention on two grounds. First, it held that the Massachusetts mechanics' lien statute is not among the types of remedies contemplated by Fed. R. Civ. P. 64, and therefore is not saved from pre-emption by the section of ERISA that saves federal laws (Pet. A15; 950 F. 2d at 21). Second, the First Circuit noted that the Massachusetts mechanics' lien law affects substantive rights by purporting to create a new right of action to recover delinquent ERISA employer contributions from one not otherwise obligated under ERISA to make them. The First Circuit therefore concluded that incorporating the state lien law into Fed. R. Civ. P. 64 would run afoul of the express prohibition in the Rules Enabling Act, 28 U.S.C. § 2072 (1988 ed.), that forbids "Civil Rules that 'abridge, enlarge or modify any substantive right'" (Pet. A14-A15; 950 F. 2d at 21).

Contrary to McCoy's hyperbolic claims that the effect of this ruling "is to declare Rule 64 invalid" (Pet. 23) or "void" (Pet. 19), and that the ruling "would essentially abolish all prejudgment remedies" (*id.*), the First Circuit's decision does nothing of the kind. McCoy

---

[14] Rule 64 makes available certain state law remedies that provide "for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered" in an action in federal district court. Fed. R. Civ. P. 64. The remedies specifically contemplated by Rule 64 are "arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies . . . ." *Id.*

retains whatever rights to pre-judgment remedies he has against those obliged to contribute to the funds he administers. What he cannot do, under the First Circuit's ruling, is add to those rights by seeking payment from an independent party, who has no direct obligation to make such contributions.[15]

The holding of the First Circuit in this regard is unremarkable, and fully consistent with two decisions in other circuits, decisions that this Court has declined to review on certiorari. See *Iron Workers Mid-South Pension Fund* v. *Terotechnology Corp.*, 891 F. 2d 548, 555-56 (CA5) (mechanics' lien statutes "do more than provide remedies for collecting judgments; they create substantive rights"), *cert. denied*, 110 S. Ct. 3272 (1990); *Bricklayers Fringe Benefit Funds* v. *North Perry Baptist Church of Pontiac*, 590 F. 2d 207, 209 (CA6) (mechanics' lien foreclosure claim does not "fall within the remedies contemplated by Rule 64"), *cert. denied*, 444 U.S. 834 (1979).

As an alternative argument to bring the Massachusetts mechanics' lien law within the savings provision in

---

[15] In order to disguise the expansion of the claim he made when he brought a separate action against MIT, McCoy misleadingly describes the nature of that action in his petition. He asserts that he first brought a claim in federal court against the employer that was liable for making contributions to the funds, and then, "pursuant to Rule 64 . . ., filed this action in state court to enforce a lien under [the] Massachusetts [lien statute] . . ." (Pet. 18). In fact, Rule 64 only contemplates the use of state pre-judgment remedies in the federal action itself; the fact that McCoy brought a separate action, against a new party, demonstrates why that additional claim lies outside the purview of Rule 64.

ERISA for federal law, McCoy claims that the First Circuit's ruling would "impair enforcement of § 515 of ERISA and § 301(a) of the LMRA" (Pet. 24-25). Because McCoy failed to offer this argument at any earlier stage in these proceedings, he should be precluded from doing so now. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970).

But this alternative argument is baseless, in any event. Both § 515 of ERISA (29 U.S.C. §1145 (1988 ed.)) and § 301(a) of the Labor Management Relations (Taft-Hartley) Act (29 U.S.C. §185(a) (1988 ed.)) speak to the obligations of employers to unions and their benefit plans; neither provides that, in enforcing those obligations, unions and plans may bring claims against other parties who are not directly obligated to the claimants. Thus declaring a state mechanics' lien statute pre-empted impairs neither statute, and there is consequently no potential for violation of ERISA's provision that saves other federal laws.

McCoy's contention that certiorari is warranted under either of these alternative arguments should therefore be rejected, as well.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

JEFFREY SWOPE
Counsel of Record
BRUCE D. BERNS
PALMER & DODGE
One Beacon Street
Boston, MA 02108
(617) 573-0100

Dated: April 15, 1992